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“WHAT'S REALLY IN THE PACKAGE OF A NAMING RIGHTS DEAL?” SERVICE MARK RIGHTS AND THE NAMING RIGHTS OF PROFESSIONAL SPORTS STADIUMS

I. Introduction

In 2002, sports stadium and arena construction projects reached a total cost volume of $7.8 billion. [1] This included fifty-eight new facility projects and twelve renovations. [2] These numbers illustrate the economic impact of the construction and development of new sports arenas. Apart from their expensive costs, sports facilities are receiving public attention for another reason, specifically the involvement of major corporations with regard to naming rights. Generally, the sale of a naming right grants a private entity the right to give the sports stadium the entity's name in exchange for monetary payments over a certain period of time. The sale of naming rights provides a major source of funds for expensive construction such as the National Football League (“NFL”) stadium in Denver, Invesco Field at Mile High, which cost about $400 million. [3]

The lucrative stream of revenues generated by the sale of naming rights took off in 1987, when the Great Western Bank purchased the naming rights to the Los Angeles Forum, which then became the Great Western Forum. [4] This was not the first corporate naming rights deal though. In 1973, the Rick Products Corporation agreed to pay the County of Erie, New York, $1.5 million over twenty-five years in exchange for the designation of the Buffalo Bills' new stadium as “Rick Stadium.” [5] Another naming of a sports facility precedes the ***328** latter by as much as forty-seven years. In 1926, the Cubs Park, home of the Chicago Cubs baseball team, was renamed “Wrigley Field” after its owner, Mr. William Wrigley, Jr. [6] Significantly, Mr. Wrigley also had an unrelated business under the same name. [7] It is not clear, however, what the exact motive was at that time; that is, whether the park was to be named after Mr. Wrigley personally or after his company. [8] So Mr. Wrigley's company might be the pioneer in the area of the naming of sports venues only by accident. [9]

While the trend toward the naming of sports stadiums is therefore not new, it gained a new significance in the 1990s. Today the vast majority of situations involving the naming of sports stadiums involves unrelated companies and large amounts of money. [10] While the sale of naming rights may be extremely profitable, Enron's naming rights for the Houston Astros baseball stadium, “Enron Field,” is, in light of the recent Enron scandal, an example of the downside of naming rights and the close affiliation between sponsors and sports stadiums. [11]

This Article explores two questions. First, it examines whether the exercise of naming rights to a professional sports stadium is a sufficient basis for the creation of service mark rights with respect to the services performed at the stadium. Second, it analyzes the question of who owns those service mark rights.

II. Further Background and Recent Development

The sale of naming rights to a major professional sports facility now involves the payment of substantial amounts of money. A private entity usually pays for the naming rights periodically. About ninety-five percent of all sports facilities constructed since 1990 have a naming rights deal. [12] The price ranges from $4 million to over $200 million, with terms of the agreements ranging from five to thirty-one years. [13] The typical price of $2 million per year, mentioned with respect to all stadiums and arena naming rights agreements, [14] has often been exceeded, ***329** especially in recent naming rights agreements to professional sports stadiums. The NFL's Carolina Panthers recently signed a twenty-year stadium naming rights agreement with the Charlotte-based Bank of America Corporation. An expert said the deal was worth more than $100 million, [15] which means that the Bank of America pays around $5 million annually. A few examples of famous facilities illustrate this point. When the Heinz Company bought the naming rights to Heinz Field, home of the NFL Pittsburgh Steelers, for $51 million for a term of twenty years, [16] the result was an average payment of $2.5 million per year. Second, Invesco Field at Mile High, home of the NFL's Denver Broncos, was named after the Invesco Funds Group in exchange for a payment of $120 million over a period of twenty years and creates revenue of $6 million a year. [17] Third, the naming rights to Pacific Bell Park, home of the Major League Baseball (“MLB”) team San Francisco Giants, were given to Pacific Bell for a period of twenty-four years and a payment of “only” $20 million, [18] a yearly average of approximately $800,000. These examples indicate that naming rights have been sold to a number of different corporations, but they have typically been sold to corporations in the airline, telecommunications/computer, automobile, consumer products, financial services, and beverage industries. [19]

Naming rights deals help both the sports facilities and their corporate sponsors. The owner of the professional sports venue receives substantial revenues to pay for construction costs or high player salaries by selling a package deal. The benefits for the corporate sponsor include the amenity clause. [20] This contractual clause sets forth the sponsor's amenities such as principal identification of the building; “advertising signs” on the building, at the entrances, and on the playing surfaces; “advertising” on the program; luxury suites; ticket discounts; radio and television spots; logos on everything from trash cans to tickets; and insignias on uniforms. [21]

Even more interesting and lucrative, however, are extended exclusive service rights however, such as the exclusive right of Enron to provide power to the Houston Astros, guaranteeing more than $200 million going back to Enron. [22] ***330** PepsiCo got exclusive pouring rights [23] at the Pepsi Center in Denver, Colorado, for all events in the arena plus the first option for in-arena vending rights and concession trade for PepsiCo's subsidiary food product division, which then [24] included Taco Bell, Pizza Hut, and Kentucky Fried Chicken. [25]

The inclusion of a smaller or larger amount of amenities is one factor explaining why the prices for the purchase of naming rights vary considerably. Perhaps the single most important factor in a naming rights agreement is the understanding that the corporate sponsor's name will be used in association with the venue at all times by venue management and tenants. [26] This use facilitates media usage in all communications and leads to recognition within the local as well as the national media. [27] Compared with the traditional media advertising, where the broadcast of a thirty-second prime time television spot can cost $1-$2 million, it becomes apparent why naming rights are efficient marketing. [28]

There is also a downside to this development though if one of the parties gets in financial or image trouble, and the other party becomes associated with the negative image. The recent Enron collapse has made international news. In response, the Houston Astros went so far as filing a motion before the United States Bankruptcy Court in the Southern District of New York for an order compelling Enron to immediately reject the Naming Rights Agreement [29] with the Astros and, among other things, to give back the naming rights to Enron Field. [30] The Astros finally settled with Enron, buying back Enron's naming right to the stadium for $2.1 million. [31]

***331** Other venues felt the economic downturn after the dot-com crash, including the Baltimore Ravens after the imminent bankruptcy of PSINet, [32] the San Francisco 49ers, looking for a new naming right sponsor for the 3Com Park, [33] and who went the 2002 Super Bowl Champions, the New England Patriots, after CMGI got in financial trouble. [34] Future naming rights deals will therefore probably contain out clauses or morals clauses, so one party can exit an agreement in cases of financial, reputational, or performance problems of the other.

III. Parties to the Agreement

A naming rights agreement is a contract between the naming rights holder and a private entity, the corporate sponsor. Corporate sponsors can contract these agreements in several ways, depending on the ownership of the facility, which may be by a team owner or by a public authority.

A complex example of team ownership is Pacific Bell's naming rights to Pacific Bell Park, home of the MLB team, the San Francisco Giants. [35] The city and county of San Francisco own the property where the China Basin Ballpark Company LLC, a limited liability company, built the sports arena. [36] This company is organized and controlled by majority interest through the team owner and franchise holder for the San Francisco Giants. The city and county of San Francisco are the landlord in the Ground Lease for property to the tenant, the China Basin Ballpark Company LLC. This Ground Lease includes a naming rights clause allowing the tenant to sell the naming rights to Pacific Bell. Thus, the team owner controls the naming rights through its majority interest in the tenant, who leases the land. [37]

The Sports Center Redevelopment Authority, responsible for a new ballpark for the St. Louis Cardinals, seems to have realized that the public should not give away the naming rights to a facility. [38] Its Ballpark Project Agreement reads: “The ***332** Authority will own the naming rights to the Ballpark,” and “the naming rights revenues from the Ballpark will go into two separate funds-one benefiting the state of Missouri and one benefiting the City of St. Louis.” [39]

IV. Registrations

Some companies use naming rights not only to build brand awareness but also to extend legal protection for their marks. These companies often obtain United States service marks. Generally a corporate sponsor registers his service in the international class 041 (“Education and entertainment”). [40] The registered service marks of the corporate naming rights sponsors mostly consist of their previously established marks plus the term “Field,” “Stadium,” “Park,” or “Center.” The registrations usually contain a disclaimer for the affix; for example, “no claim is made to the exclusive right to use ‘Stadium’ apart from the mark as shown.” The corporate sponsors registered different descriptions of their services, but two general expressions are widely used: providing stadium facilities for sports and entertainment and providing entertainment in the nature of sporting events.

Examples of registrations include:

- BUSCH STADIUM, “providing a sporting and entertainment facility for the enjoyment of others,” owned by Anheuser-Busch, Incorporated; [41]

- ENRON FIELD, “Providing Stadium Facilities for Sports and Entertainment; Arranging and Conducting Athletic Competitions; Providing Entertainment in the Nature of Sporting Events and Related Activities,” owned by the Enron Corporation; [42]

- UNITED CENTER, “entertainment services; namely providing and leasing stadium facilities for sporting events . . .,” owned by United Airlines, Inc.; [43]

***333** - INVESCO FIELD AT MILE HIGH, “Providing Facilities for Sporting Events, Namely Football Games and Soccer Matches. . . .” owned by Amvescap PLC Company United Kingdom; [44]

- PACIFIC BELL PARK, “Entertainment Services In the Nature of Baseball Exhibitions,” owned by Pacific Telesis Group (Nevada Corp.); [45]

- PEPSI CENTER, “Operation of a Sports, Entertainment, Convention and Exhibition Arena, And Production of Sports and Entertainment Events for Public Exhibition and Television and Radio Broadcast,” PepsiCo, Inc. (North Carolina Corp.). [46]

The current growth of registrations of service marks is a strong argument that the private entity holding the naming rights provides an entertainment service since those service marks were registered by the United States Patent and Trademark Office (“PTO”) and are considered prima facie valid. The registrations are not conclusive though, and a closer look at the marks registered raises a number of questions.

V. Do Naming Rights Arrangements Create Valid Service Marks?

A. WHAT IS A SERVICE MARK?

According to the federal Lanham Act,

> [t]he term “service mark” means any word, name, symbol or device, or any combination thereof (1) used by a person, or (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this Chapter, to identify and distinguish the services of one person, including a unique service, from the services of others and to indicate the source of the services, even if that source is unknown. [47]

Pursuant to section 3 of the Lanham Act, service marks are registrable and protectable to the same extent as trademarks, except that one requires use in association with a service and the other use in association with goods. [48] In ***334** determining whether a service is performed, each case must be considered on its own merits. [49] The PTO has followed the meaning generally used in connection with service businesses such as laundries, insurance companies, telephone companies, and railroads. [50] These businesses have in common the overriding fact that they deal in services and do not ordinarily sell products. [51]

B. REQUIREMENTS

The Lanham Act defines the term service mark, but it does not define what constitutes a service. The PTO's Trademark Manual of Examining Procedure (“TMEP”), states the following criteria that have evolved for the

> factual determination of what constitutes a service: (1) a service must be a real activity; (2) a service must be performed to the order of, or for the benefit of, someone other than the applicant; and (3) the activity performed must be qualitatively different from anything necessarily done in connection with the sale of the applicant's goods or the performance of another service. [52]

While the first criterion excludes a mere concept or idea and is not significant for the analysis, the other two criteria must be scrutinized.

1. Service Performed for the Benefit of Someone Else? The TMEP requires that an activity must be primarily for the benefit of someone other than the applicant. [53] The controlling question is who primarily benefits from the activity for which registration

is sought. [54] This analysis was followed by the PTO Trademark Trial and Appeal Board (“T.T.A.B.”) in the Skoal Bandit case, where it defined a service as “an activity engaged in for the benefit of someone other than the one engaging in the activity. . . .” [55] In this case, the applicant, the producer of the Skoal Bandit tobacco product, wanted to register “Skoal Bandit” as a service mark for an auto racing team that it sponsored. The T.T.A.B. held that a great number of people were entertained by and benefited from applicant's entertainment ***335** services, namely the participation in automobile races, and may have no interest whatsoever in tobacco products. [56]

Transferring this analysis to the services of corporate sponsors of professional sports stadiums, the same result could be reached. The corporate sponsor providing stadium facilities similarly entertains people because a great number of people benefit from those services by either attending sports games or watching them on television. Therefore, it seems like the provision of stadium facilities and sporting events are activities engaged in for the benefit of sports fans. The T.T.A.B.'s analysis, however, is also concerned with the public's interest in the sponsor's primary product. The analysis implies that where a great number of people are interested in the principal product, the T.T.A.B. will not regard the performance as a service for the benefit of somebody else.

2. Service Sufficiently Separate from the Principal Activity? The second portion of the Skoal Bandit analysis introduces the requirement that a service must be sufficiently separate from the principal activity. [57] The main concern is the exclusion of mere promotional activities, which are not considered to be services. Therefore, one has to first ascertain the corporate sponsor's principal activity under the mark in question and then determine whether the activity identified in the registration is in any material way a different kind of economic activity than what any provider of that particular product or service normally provides. [58] Accordingly, the T.T.A.B. has held that “each situation . . . must be evaluated on its own facts” [59] and that a service usually is being rendered “when the activity is separate from the activities usually considered to be necessary to market the goods.” [60]

In the Skoal Bandit case, the T.T.A.B. stated that the “activity of participating in automobile races could hardly be deemed to be something that a purveyor of tobacco must necessarily do.” [61] It continued that it would be hard to imagine two less similar ways to make money than the sale of tobacco and the entertainment of people through car racing activities. [62] Thus, an activity that goes beyond what normally is expected of a manufacturer in the relevant industry may be a registrable service, even if it also serves to promote the applicant's primary product or service. [63] At this point it should be noted that the opinion is from 1957, and today, it is open to question how much corporate sponsors are involved ***336** in various activities through their sports marketing departments. Auto racing might have become necessary for tobacco companies because of prohibitions of advertising in other areas.

In another case, appealed from the PTO's refusal to register a service mark, conducting women's golf tournaments by a clothing manufacturer was held to be a service, because it is not an activity normally expected in promoting the sale of women's clothing. [64] The fact that apparel was not promoted or offered for sale at the tournaments nor mentioned in connection with tournaments apparently influenced the Commissioner's decision of what “normally is expected” in such circumstances. [65]

In yet another case, the T.T.A.B. held that a contest that serves to promote the sale of the applicant's goods might be registrable if it operates in a way that confers a benefit unrelated to the sale of the goods, and the benefit is not one that is normally expected of a manufacturer in that field. [66] In the latter case, the T.T.A.B. further held that the fact that the applicant uses, in conjunction with such activity, a mark different from that used in conjunction with its principal goods or services, is also a factor to be considered in determining whether the activity is a service. [67]

Activities that cannot be considered as a service are usually activities of the seller of products involving, for example, design, production, sales, sales promotion, product use, advertising, or the creation of goodwill in connection with a product, albeit under a different mark. [68] For the analysis, it first must be determined whether it is normally expected for corporate sponsor to provide stadium facilities. This decision will vary with respect to the principal mark of a corporate sponsor and must constantly be measured with the relevant industry. The determination of what is normal in a certain point in time can become a quite difficult task. In particular, the development of separate entertainment operations within large corporations is a factor that was not considered to be normal when the aforementioned decisions of the T.T.A.B. were rendered.

An example can shed some light upon this evolution. Anheuser-Busch has its own Busch Entertainment Corporation (“BEC”) with the mission to support Anheuser-Busch's beer brands and to enhance Anheuser-Busch's image. [69] The attractions include a village featuring Irish restaurants, shops, and dancers at Busch Gardens in Williamsburg; the Rhino Rally at Busch Gardens in Tampa Bay; ***337** and shows such as “Cirque de la Mer” at San Diego Sea World, all of which combined to generate pre-tax profits of $131 million for the BEC. [70] Thus, the question is: is it normally expected for a company like Anheuser-Busch to provide stadium facilities, or does that go beyond what beer brewers usually do? In this regard, it is worth noting that Miller and Coors also sponsor baseball stadiums, called Miller Park and Coors Field respectively, and both also employ corporate officers for sports marketing.

Second, regarding the separation of the principal activity of a corporate sponsor and the service offered, it seems that as a naming right sponsor becomes increasingly involved with its principal product in a stadium, it also faces an increased risk that its service is mere ancillary promotion. A sponsor like Pepsi who has secured exclusive pouring rights for its “Pepsi Center” and has included an amenity clause in its naming rights agreement will therefore be at a disadvantage compared to a company like CMGI or Edward Jones, [71] who uses its lesser known mark more for brand building and is rarely involved in other promotions in and around the sports stadium. At least when corporate sponsors choose service marks not identical with their principal marks, their stadium services are distinguished from their main activity. For example, American Airlines named a sports stadium in Miami, Florida, American Airlines Arena.

In sum, the Examiner will determine whether an activity constitutes a separate service based upon the full factual context of the service, and it will take into account the normal expectation with respect to promotional activities for the sponsor's primary business, the benefit unrelated to the sale of goods, and whether a slightly different mark is used in connection with the services.

C. DOES THE CORPORATE SPONSOR'S ASSERTED SERVICE MARK FUNCTION AS A MARK?

1. Functions of a Service Mark. A service mark signifies that all services bearing the mark come from and are controlled by a single, albeit anonymous, source; are of equal level of quality; and serve as a prime instrument in advertising and selling the services. Professor J. Thomas McCarthy states in his treatise that a potential customer approaches a service by asking the question: “Who are you?” [72] He continues, “In this sense, trademarks answer the question ‘Who are you?,’ in that ***338** this really means ‘Where do you come from? Who is responsible for your creation and quality?’.” [73] So it is the perception of the ordinary customer that determines whether the asserted mark functions as a service mark, not the corporate sponsor's intent, hope, or expectation that it does so. [74] The public has to perceive that the corporate sponsor in fact provides a service and not merely a somewhat more sophisticated and effective advertising strategy. It is this identifying function that is questionable with respect to professional sports stadiums naming rights as the basis for service mark rights.

2. Use as a Mark Versus Mere Advertising. Obviously not every symbol used in advertising qualifies as a mark. In this regard, “the proponent of trademark rights must show that this designation in and of itself serves the function of indicating the origin of the product-that is, that it functions as a trademark.” [75] The key issue is whether the designation in question, as actually used, will be recognized by the public in and of itself as an indication of origin for this particular product or service. [76] Therefore, mere advertising has to be differentiated from service mark use. So the question is, what does the public understand the naming rights to mean? In a way, this is the same question the Examinerdetermines factually but from the perspective of the public's understanding. This understanding can change over time and is affected by a variety of different factors.

At the outset of this analysis, it is to be kept in mind that the service mark itself serves the seller as an element of advertising. The authors of the Restatement noted, “this ability of a mark to generate good will through advertising has also gained recognition under the law of trademarks.” [77] So “[t]oday, creative response to consumer demand is a significant function of trademarks in today's multi-billion dollar advertising market. A trademark is not merely a symbol of good will but is often the most efficient agent for the very creation of good will and consumer acceptance.” [78] This goes hand in hand with the historical development of trademarks, which originally “were thought to represent to the consumer the source or origin of the product or service to which they were affixed and could not be assigned or licensed.” [79] The courts gradually softened this source function, and today it is established that “[t]rademarks can also serve ***339** to identify and distinguish a “secondary source” in the sense of indicating sponsorship or authorisation by a recognized entity.” [80] This development indicates the public's increased perception of commercial symbols performing mark functions rather than ornamental or advertising purposes. At the same time, as the public increasingly perceives commercial symbols as performing mark functions, it clearly cannot be enough to put one's name on a building just like on a billboard and be perceived as rendering a service. A service mark must be used in a way that makes a commercial impression separate and apart from the other elements of the advertising matter or other material upon which it is used, such that the designation will be recognized by prospective purchasers as a source identifier. Some comments in the press indicate a mere advertising effect; for example, Mr. Dean Bonham of the Bonham Group, a Denver corporation specialized in the business of naming rights, states that “the vast majority thinks naming rights is as simple as hanging a corporation's moniker on the entrance to a stadium and the CEO getting a suite. . . .”[81] While admitting that simply renting advertizing space is not enough to render a service, because the service has to be known by the applicant's mark, the T.T.A.B. held that it is enough if a mark is on the service object itself (in this case a racing car) and identifies the trademark owner as the source of services performed with the car.[82] In comparison, a professional sports stadium would be more like the main building at the racetrack, and the service object itself would be the sports team on the field. Therefore, the analogy to this case is only helpful to a certain extent.

A strong argument in favor of the naming of professional sports stadiums finding that constitutes a use as a mark is the consumer's perception of merchandise use being trademark use. For example, the merchandise offered by PepsiCo in their Internet web store ranges from T-shirts, jackets, and hats to wristwatches and glasses.[83] Anheuser-Busch, the world's largest brewer, offers in its online shop steins, swim apparel, and almost anything one can imagine with the insignia of an Anheuser-Busch mark.[84] Furthermore, the vast number of trademark registrations for this merchandise means that the PTO has considered those merchandise uses to constitute uses as a mark. For example, two of the Coca-Cola Company's current registrations for goods and services read as follows: “clothing for men, women and children, namely, aprons, bath robes, bathing ***340** suites, beachwear, belts, bibs, blouses, camisoles, diapers . . .”[85] and “salt/pepper shakers, sugar shakers, straw dispensers, toothpick dispensers, napkin dispensers, and ice buckets.”[86] Besides trademark registrations for merchandise, trademark registrations for other entertainment services indicate a change in the mark function. For example: “. . . entertainment services in the nature of an interactive area at baseball stadiums, namely a structure composed of wood beams, climbing areas and slides; entertainment in the nature of a youth baseball theme park featuring miniature baseball fields on which children can hit, run and catch baseballs; and entertainment services, namely, providing static exhibits of embossed signatures of famous baseball players that can be rubbed to create autographs.”[87]

In sum, there are some doubts that the public will perceive the stadium name as a source and quality indicator in the first place, but the recognition of merchandise use to be trademark use supports the finding of valid service marks in relation to the naming of professional sports stadiums. It will further depend on the public's perception of the source of provided entertainment in any given case.

D. IS THE CORPORATE SPONSOR PERCEIVED AS PROVIDING ENTERTAINMENT?

Another problem is the question of whether the public perceives the corporate sponsor, who owns the naming rights to a professional sports stadium but not to the sports team, as providing entertainment services. Dr. Larry M. McCarthy & Dr. Richard Irwin concluded in their article about naming rights that “consumers' view of the stadiums and arena sponsorship would appear to be a critical research question.”[88] Therefore, it must be determined what the public believes to be entertainment. Generally, entertainment is defined as “the act of diverting, amusing, or causing someone's time to pass agreeably.”[89] The crucial question is whether the relevant public perceives a corporate sponsor's activity to be entertainment. In this regard, the additional promotional effectiveness cannot matter. Rather, the analysis has to answer the three-fold question: whether there entertainment, what it is, and who is responsible for it. The finding of entertainment depends on the public's perception. The relevant public seems to include all of the national sports fans who watch the games of a particular team or teams ***341** in a professional sports facility, either on television or by attending the game in the stadium. The fans of a professional sports team are the ones who are entertained by this service.

What entertainment is depends on whether one takes a narrow or a broad view. A narrow view focuses on the responsibility for the performance of the professional sports team. A broader view of entertainment includes other factors that contribute to the fan's amusement, diversion, and perception of the activities at the stadium as a whole.

The answer to the question whether the corporate sponsor contributes in a way that is perceived by the public as a contribution to that entertainment service depends on the view one follows. During this analysis, the focus has to be on the question of who is responsible for the creation and quality of the entertainment. Regarding the corporate sponsor's contribution to the entertainment service, it is true that there cannot be a common answer for all the naming rights owners. Accordingly, a necessary case-by-case judgment is the path to follow.

1. Narrow View of Entertainment. With the focus on the responsibility for the performance of the professional sports team, it is fairly unlikely to assume that the public holds the Heinz Corporation, responsible for what the Pittsburgh Steelers football team does, when the team is playing on Heinz Field. Which fan would comment on a quarterback's pass that got intercepted by saying, “Damn CEO of Heinz!”

A reason might be that team sports are to be treated differently in the service mark context. There is a difference between the team performance of one of the three major sports (football, baseball, and basketball) and an auto racing team, for example. In auto racing, the T.T.A.B. allowed the registration of a service mark for entertainment services, namely participating in professional auto racing. [90] While the dissent in this case argued that the mere participation could not be enough activity to render a service, [91] the question of whether the display of the “Skoal Bandit” mark on the car and personnel of the team was enough contribution to a public perception was not even discussed. The difference to naming rights of professional sports stadiums lies in the presentation of the mark on a team instead of on a building; this case still sheds light upon the issue here.

Marc Ganis, chief executive president of Sports Corporation Ltd., a Chicago naming rights specialist, supported a view of responsibility by the corporate sponsor, when he said in connection with the Enron scandal, “there is such a close affiliation with the team and the company, it threatens the public perception of the team.” [92] Does this mean Enron is perceived as responsible for the team's ***342** performance? This appeared to be the position of the Houston Astros before the bankruptcy court in New York in their motion to compel Enron to immediately reject the Naming Rights Agreement. [93] The motion stated that “[g]iven the barrage of telephone calls and media inquiries the Astros receive each day, it is clear that the name ‘Enron Field’ and the Enron logo displayed on the Stadium wrongly suggest to the public that the Astros are associated with the alleged bad business practices of Enron. As it stands, the Houston Astros arguably are viewed as Enron's team.” [94]

The perception of responsibility is diluted, however, when there is more than one team based in a sports facility or when the stadium is also used as an arena for other purposes. Hardly any consumers will believe that the corporate sponsor is responsible for each and every performance in the arena, like professional sports games and music concerts. Then again it is not unthinkable that a naming rights sponsor of professional sports stadiums influences the team's performance. The hypothetical “Nike Arena,” with Nike also providing equipment for players, such as shoes, shirts, hats, and so forth, could be perceived as influencing the team's performance. Shoes in particular could be perceived as being of influence, regardless of whether this is reasonable. The difference to the impact on the public's perception by calling the professional sports team “Team Nike,” for examples, becomes apparent at the same time though. This has been done in the past, [95] but it is not part of major league sports today.

2. Broad View of Entertainment. Entertainment can also be defined in a broader view. Under this broad definition, entertainment includes other factors beyond the performance of the professional sports team that contribute to the fan's amusement, diversion, and perception of the activities at the stadium as a whole. In this regard many more things are influencing the entertainment including the music, fireworks, ambience and, especially for people attending the game live in a sports stadium, food, drinks, retail, and restrooms. At the Bank One Park of the Arizona Diamondbacks, there even is a swimming pool. [96] The focus, again, should be on the core question: which activity of a corporate sponsor does the fan perceive as contributing to the entertainment? Factors influencing the corporate sponsor's contribution could be the fame of the corporate sponsor, the ***343** role of the main trademark and the relation to the service, the number of professional sports stadiums bearing the corporate name, the name of the professional sports stadium itself, and the service of providing the sports facility.

a. Fame of the Corporate Sponsor. In viewing the corporate sponsor's mark as an indicator for entertainment services, the location of the sports stadium can play a role. Local citizens may perceive a greater involvement by a major local company. An example is “Heinz Field” in Pittsburgh, where the stadium is named after the famous company Heinz, and both company and stadium are located in this city. Heinz was even founded, in Pittsburgh, as early as 1869. [97]

The local involvement of a corporate sponsor can also be detrimental though. Many companies have long given money to various institutions to demonstrate a commitment to philanthropy but without providing or controlling the institutions' services. This trend of corporate sponsorship has increased lately and extended beyond auditoriums, exhibits, and endowed chairs at universities to the naming of entire buildings. [98] Therefore, a company that has its name in many places around the city might be perceived by the public as making just another contribution or advertisement when naming a professional sports stadium. This again leads to the possible conclusion that a corporate sponsor whose most visible use of his mark is on the stadium will more likely be perceived as the one being responsible for the activity in the stadium and its quality.

In sum, if a corporate sponsor wishes to secure service mark rights, it seems advisable for the sponsor to be quiet about its principal business instead of announcing its regular service or products with the introduction of its name at the stadium. This again stresses the importance of the separation between the principal product and the service.

b. The Role of the Main Trademark Product and the Relation to the Service. The involvement and the fame of the main mark are factors to consider. The vast majority of registered naming rights service marks are names that are similar to the principal marks; for example, “Enron Field” is the service mark related to the trademark Enron, and “Pacific Bell Park” is the service mark related to the trademark Pacific Bell. The involvement of the sponsor's primary product in the fan's experience at the facility can strengthen the fan's perception that the facility's name is the service mark for entertainment. The perception becomes clear considering the following contrary examples: “Coors Field” and “Pepsi Center” on the one side, “Edward Jones Dome” and “CMGI Field” on the other. Both famous beverages, Coors beer and Pepsi soda, are usually going to be offered ***344** exclusively in each respective sports facility due to package deal agreements. [99] In contrast, while Edward Jones investment services can be offered at an information booth, it is highly unlikely that this adds to the entertainment in the stadium. Beverages in a sports facility, however, are part of the broader entertainment picture. While how much original entertainment a beverage contributes may be arguable, it is clear at the same time that those products keep people on an entertained level. One merely has to imagine how much fun it would be to sit in a baseball stadium for four hours without anything to drink. But again, with respect to the separation issue discussed above, [100] the involvement of the primary product is detrimental with respect to the establishment of a service.

The positive aspect of the involvement of the main mark is the source indicating recognition due to the development of the merchandise business. [101] This kind of recognition, however, will only take place if the merchandise is related to better known marks. Overall, this could lead to a rule of thumb that the more the sponsor's main mark is involved unrelated to the primary product in the fan's experience of the broadly viewed entertainment service, the more likely the fans will perceive the sponsor's name on the facility as a service mark for entertainment. Put in another way, the fame and involvement of the main mark is directly proportional to the perception of the service mark as actually providing entertainment.

c. Number of Arenas Bearing the Corporate Name. A corporation owning naming rights to two or more sports facilities could more likely be perceived as being involved in the entertainment service. The public, aware of multiple facilities, could perceive the corporate sponsor as being more serious about the business of sports facilities and the responsibility for the quality of their services. Therefore, the repeated appearance of a corporation's mark on stadiums might be less likely to be perceived as simply another billboard. The Compaq Corporation, for example, has the naming rights for a sports stadium in Houston, Texas, and closed a second arena naming rights deal with the San Jose Arena in Silicon Valley, which was called “Compaq Center.” [102] This might have increased the public perception for some time that “Compaq Center” was an entertainment branch of Compaq. Now the stadium is called HP Pavilion after the merger of Hewlett-Packard and Compaq. [103]

***345** A policy of the PTO supports this finding. In the music business the name of a musical performing group can also serve as a service mark, but “the PTO takes the position that the name of a musical performer is not registrable for musical sound recordings unless the name is used on a series of sound recordings and applied to at least two different recordings in the series.” [104] This position is additionally confirmed and put in relation to the above mentioned quality control by the Federal Circuit, which held that while mere use of a performing group name on a record will not by itself enable a trademark registration for recordings “[w]here the owner of the mark controls the quality of the goods, and where the name of that recording group has been used numerous times on different records and has therefore come to represent an assurance of quality to the public, the name may be registered as a trademark since it functions as one.” [105] This comparison per se would lead to the conclusion that only very few professional sports stadiums named after a famous corporation would be perceived to be entertainment service marks.

d. The Name of the Professional Sports Stadium Itself. When a corporation is choosing a name for its entertainment service, it should keep in mind, without going into too much detail, that the designation has to be distinctive. This usually should not be a problem, however, since the main mark will often already have been a distinctive mark. For example, Pepsi is a well-known trademark, and thus, "Pepsi Center" is a distinctive service mark, whereas the registration contains a disclaimer for the term "Center." In the case of United Airlines' naming right to "United Center" though, it is questionable whether the facility's name supports its status as a service mark. [106] It is problematic for a customer to recognize the involvement of United Airlines by leaving out the term "Airlines."

e. Providing the Sports Stadium. The next relevant question is whether the public sees the corporate sponsor as the provider of the professional sports stadium and what "providing" means. The public's perception in this regard can either mean "providing" in the sense of the construction or "providing" in the sense of support for the maintenance and control over the activities within the stadium.

None of the professional sports facilities scrutinized for the purpose of this Article is owned by one of the corporate sponsors. Generally, stadiums are either owned by the team owner (one third), which mostly is an ownership group, or by ***346** a public authority (two thirds). [107] Therefore, it is unclear why the public should perceive the naming rights holder as offering the service of "providing facilities" in the construction sense even though the public can constantly read in the newspapers that a big part of the cost of new facilities is paid through the revenues of naming rights deals. [108]

In case "providing" the sports stadium means supporting it, doubts exist regarding the service of sporting events, especially regarding whether the owner of the naming rights is perceived as rendering the service of offering those sporting events. While with respect to the description of the services there are doubts that the public will perceive the corporate sponsor as the provider of the facility, it would be reasonable to include this contribution as a factor into the broader view of providing entertainment. Not only for those fans actually going to the stadium, but also for those fans back home watching television, it would not be the same entertainment without the facility itself. The difference between any game taking place on an open field and a game in the thrilling atmosphere of a professional sports stadium is something that the Romans appreciated in a similar way over 2000 years ago. This important aspect of entertainment might actually even be considered as entertainment within the narrow view of the definition of entertainment.

3. Interim Conclusion. The interim conclusion with respect to the provision of entertainment services thus is that first, there are two ways in which the public could perceive a corporate sponsor as the provider of entertainment services. On the one hand, a corporate sponsor might be perceived to be involved in the main entertainment (narrow view), but there is little potential for this perception. On the other hand, a corporate sponsor will potentially be perceived as responsible for the broader entertainment as a whole, or at least for parts of it. The determination of the latter can result in the use as a mark. The analysis of this with respect to the crucial public perception then results in many "gray" areas and does not allow a general and clear "black or white" determination. Rather, the result will differ from case to case. The key point seems to be high public involvement outside of the primary product.

*347 VI. Ownership

The question of ownership of the service mark for entertainment services depends on the answer of the four main questions: who controls the service, [109] what theory of ownership is to be followed, who are the parties involved in the whole entertainment, and what exactly qualifies as entertainment. [110] Professor McCarthy's treatise states, "Trademark ownership inures to the legal entity who is in fact using the mark as a symbol of origin." [111] Further, it is settled law that ownership of a mark is established by priority of appropriation.

A. USE THROUGH THE ACTUAL RENDERING OF A SERVICE

First, a right of ownership in a service mark arises only from the use of the mark in connection with the service, not from mere adoption of the mark. Use means that the party asserting service mark rights should be mainly responsible for the actual quality of the service.

GAF Broadcasting Co. v. Caswell-Massey Co. [112] illustrates this issue. In that case, the T.T.A.B. denied the application of an advertiser for a service mark for featuring "early music" under the mark "Music of the Perpetual Past" on a radio program. [113] The radio station generally classified the advertisers as "clients" or "sponsors." The advertiser applied for the service mark registration, and as a “sponsor,” paid for all the commercial time of a particular program broadcasted by the radio station and on several occasions made suggestions regarding the types of music selected, but the specific pieces of music for each program, the prepared commentary, and the playing order were chosen by the radio station. The Board found that “applicant's role was solely that of an advertiser” because “his contribution to the selection of the program title and his suggestions as to the content of the programs fall far short of the sort of activity that would have created for applicant ownership and registration rights in the service mark.” Hence, a corporate sponsor should have this control test in mind if desiring to create service mark rights in relation to the naming rights arrangements with a professional sports stadium.

*348 B. THEORY TO BE FOLLOWED

The decision of the ownership of a mark, in situations where multiple parties are involved with the services, further depends on the policy one follows and the consumer perception or private contractual agreements of the parties.

1. Contractual Provisions. The Skoal Bandit case reflects the approach of most American courts that look at the contractual provisions in determining the ownership of the service mark. The T.T.A.B. rejected the Examining Attorney's argument that the applicant did not control the nature and quality of the services rendered and that the agreement did not specify those services. In rejecting those arguments, the T.T.A.B. directly jumped to the contract, which stipulated that the trademark owner of the “Skoal Bandit” mark retained ownership of the identical service mark for participating in professional auto races. Thus, the T.T.A.B. found “the contract satisfactorily explains the relationship between the parties.” [114] At this point, it should be noted that the public perception was not even mentioned. With respect to the specific performance laid down in the contract, the Board further stated that it was not necessary to stipulate exactly the performance. [115] It was held to be sufficient for the owner of the service and trademark to specify “who the crew chief and driver of the car will be” and to require the contractor “to keep them on the team or replace them, if it were to become necessary, with persons of equal ability and reputation.” [116] Therefore, it was not necessary to stipulate technical details in order to keep control over the quality of the services rendered by the contractor in connection with the service mark.

In summary, this means for the analysis of ownership that the naming rights agreement between the parties determines the ownership for entertainment services rendered, if one decides to follow this policy, and if the ownership issue was specifically addressed in the contract. The application of this notion to professional sports venues will be explained in detail. [117]

2. Consumer Perception of the Responsibility for the Service. Generally, the involvement of multiple parties rendering the service will not be obvious to the public, but in his treatise, Professor McCarthy refrains from exclusively considering the underlying contract in deciding cases that involve more than one party. In cases of multiple parties involved in services rendered under a single mark, he believes that “problems can only be dealt with adequately by giving weight to customer perception and the identification of source and quality policies of trademark ***349** law.” [118] He also transfers this concept wholly or in part to two other areas: the landlord-tenant situation and entertainment performing groups. [119]

With respect to the landlord-tenant relationship, he states that the “[o]wnership of a service mark identifying a business carried on at rented premises will depend on a weighing of the policies of customer perception and contractual provisions between landlord and tenant.” [120] An example given is a tenant's lease of a landowner's historic premises, which had already been leased under the same name to many tenants for restaurant services. In this case the landlord, not the actual tenant, owns the service mark for restaurant services because the service was consistently perceived with the building. [121] Another example is the tenant of a hotel that is established and well known before its services were improved, and the reputation increased by the new tenant. Even then, the tenant responsible for the improvements was held in several cases not to be the owner of the service mark. [122] But a tenant who rents premises in a certain location and creates a new home, and thus mark identity to identify his restaurant services, would appear to the public to be the owner of the service mark. [123] Even though these examples cannot be easily transferred by analogy to the ownership question in this analysis, it will be interesting to take a similar approach regarding professional sports facilities.

The second area where Professor McCarthy transfers the concept of consumer perception is in the context of the entertainment performing group. In this case, McCarthy's notion is that the perception of the customer is the only adequate way to deal with mark ownership, and the reference to traditional rules of **corporation** and partnership **law**, an approach taken by most courts, is ill suited to resolve disputes. [124] His approach is to first determine “whether the group name is personal to the members or not” and then to determine “for what quality or characteristic is the group known and who controls the quality?” [125] Following this approach generally will be the question of whether a manager or promoter of a musical group is the owner of the service mark under which the music group renders entertainment services or whether the music group itself owns the mark. A manager will be the owner, like the owner of a sports team, if the service mark identifies a style of singing rather than the identity of the performers, and the ***350** manager hired performers who merely play the roles in the group. The opposite result was achieved in the New Edition case, [126] where the court followed McCarthy's approach and held that public association was crucial in the determination of ownership. Ownership was established with the music group itself since it existed and performed long before the manager connected with the band. This latter area, where consumer perception prevails, is a consideration in the latter analysis as well.

In sum, public perception is another significant approach with respect to the ownership issues to the service mark that naming rights owners have registered. Although this is primarily the approach of Professor McCarthy, some courts have followed it because it reflects general American trademark principles. This focus on consumer perception is also prevalent in the areas of generic terms, distinctiveness, and the likelihood of confusion. The risk for corporate sponsors lies in the possibility that the public perception takes precedence over the agreement between the parties.

C. PARTIES INVOLVED

As mentioned previously, the court must consider the parties involved in the naming rights agreement at the outset of the ownership question. As described, [127] three parties can be involved: the team, the stadium owner, and the corporate sponsor. While the stadium service mark, which in most cases is similar to the main mark of a corporation that bought the naming rights, usually will not be claimed by the team or stadium owner, it nevertheless is possible such as when a sponsor's mark is little known and seen by the public primarily in connection with the stadium.

Other complications can arise with respect to the enforcement of service mark rights once a corporate sponsor breaks away. What happens, for example, if the Denver Broncos-the licensee of the trademark “Mile High Stadium,” licensed from the owner, the city of Denver [128] -keep using this or a very similar service mark, like “The Broncos at Mile High,” for providing entertainment services, after the termination of the naming rights agreement with the Amvescap Company? Who will prevail in a lawsuit, the Denver Broncos or the Amvescap Company that has a registration for “Invesco Field at Mile High,” a service mark for providing facilities for sporting events, namely football games?

*351 D. DEFINITION OF THE ENTERTAINMENT SERVICE RENDERED

At this point, the definition of “entertainment” and what exactly “services rendered” includes is crucial. As stated previously, [129] the corporate sponsor has to be perceived in the eyes of the public as providing the entertainment service.

E. EXAMPLES

1. United Center. Assuming the United Airlines Corporation is in fact rendering a service by providing a sporting and entertainment facility, and assuming this service is in fact perceived by the consumers (fans) as part of the entertainment, should not the service mark (“United Center”) be owned by the United Airlines Corporation?

In support of this notion, it must be emphasized that it will be hard to imagine that the team or stadium owners are in fact using this service mark as their own, since they probably would be afraid of infringing the United Airlines trademark, even though this is unlikely with respect to the validity of the mark. [130] The service rendered will probably be in the range of the broader view of entertainment and can be considered as a major contribution to the entertainment of the fans. Also, the assumption has to be made for the purpose of this analysis that providing a facility for professional sports events is considered to be a service.

Using their approach, most courts will then proceed to look at the contractual provisions of the naming rights agreement between the stadium owner, the United Center Joint Venture, headed by Mr. William Wirtz, and the United Airlines Corporation. In this context, it is probably fair to assume that the latter has made sure that the naming rights agreement will respect its registered service mark.

Taking the public's perception into consideration, does the result now change? The question to ask is who controls the quality of the entertainment? In this case, it becomes obvious how important the definition of entertainment is because the narrow view would only look at the performance of the teams. In this case, it is even more complicated because two major professional teams play in the UnitedCenter: the Chicago Bulls of the NBA and the Chicago Blackhawks of the National Hockey League. Each team owner controls the quality of his team. Each team owner, much like the manager of a music band who creates a music group which then identifies a style of singing rather than their identity, controls the quality of the team's performance directly and indirectly. The direct control is established through the power to sign new players on to the team or lay off ***352** other players. The team owner's indirect control is performed through his control over the coach of the team since the team owner employs the latter.

At this point another comparison can be helpful. As in the case of the owner of the service mark “Skoal Bandit,” [131] it will not be necessary for the team owner to stipulate in detail how the coach of the team gets his strategy to win games. As long as the team owner specifies who the coach is and what players, of equal quality, will be signed on for the team, he has sufficient control over the quality of the team's performance. While the issue need not be decided here, it illustrates that there is no way that United Airlines will be in control of the entertainment under a narrow view. Furthermore, United Airlines marks are not on team uniforms, equipment, or part of the team name.

In light of the quality control of the entertainment under a broader view, it would have to be the public's perception that United Airlines is in charge of the entertainment service. First, it is doubtful because of the chosen name for the entertainment service, which is especially unlucky with two teams playing at this venue and other entertainment going on, because this also means that the venue is a “united” entertainment facility. Second, even though the familiar design of United Airlines can be found at the stadium and the name “United Center” is printed in UAL design on the basketball court, it seems highly unlikely that United Airlines is perceived to control the entertainment. The result is that it depends on the theory one follows whether United Airlines can be regarded as the owner of the service mark since United Airlines will only be the owner following the contractual ownership policy.

2. Invesco Field at Mile High. This is an interesting case following the theory of the public perception. This service mark, registered for “providing facilities for sporting events, namely football games,” seems to be comparable to the landlord-tenant relationship Professor McCarthy uses with respect to restaurant services. [132] The stadium was called Mile High Stadium since 1968, and the city of Denver registered this name in 1998 as a service mark. [133] How does this affect the ownership of Amvescap's registered service mark “Invesco Field At Mile High?” The situation is a bit different than a landlord-tenant case because first, the venue is not the same, as the old Mile High stadium that was replaced by a newly built stadium, [134] and second, it is not the same landlord renting a facility to different tenants. Rather, the service mark owner allegedly provides entertainment services ***353** but does not lease the facility from the stadium district that owns the facility. Since the public perception is key according to Professor McCarthy, however, it is similarly questionable whether the new name of the facility, presumably used in connection with the alleged entertainment service, is perceived as belonging to the source that owned the “Mile High Stadium” service mark, namely the city of Denver.

3. Heinz Field. Another interesting ownership question could arise in the case of the public perception of Heinz Field. While the contractual agreement might stipulate the ownership question, the public perception could be different again. The Heinz Corporation did not register a service mark under this name. Heinz signed a contract with the Sports & Exhibition Authority (SEA), a joint authority for the City of Pittsburgh and Allegheny County. [135] The SEA is a public authority with the mission “to provide venues for sporting, entertainment . . . events for the benefit of the general public. . . .” Also, the SEA currently owns and operates the Civic Arena, leases the Benedum Center to the Pittsburgh Cultural Trust, and is responsible for the management of the David L. Lawrence Convention Center. [136]

So finally there is an entity that actually provides facilities for entertainment as a service, but it is not using a service mark, and it is practically impossible to get the “Heinz Field” registration since it would infringe the main trademark of the Heinz Company. Furthermore, another service mark would be difficult to establish because “Heinz Field” is visible all over the stadium.

4. Busch Stadium. The ownership issue in this case has been simple until 1995, but it did not involve a naming rights agreement. “Busch Stadium” is a registered service mark of the Anheuser-Busch Corporation for providing a “sporting and entertainment facility.” The Anheuser-Busch Corporation was the owner of the St. Louis Cardinals and owned the facility. Therefore, the service mark “Busch Stadium” belonged to the Anheuser-Busch Corporation. In 1995, the ownership of the team changed. Did the rights to the service mark change too?

VII. Conclusion

While it is sure that the hunt for naming rights will continue in all areas, [137] it requires close scrutiny, a case by case evaluation of the facts, and depends on the ***354** theory of ownership followed, whether the purchase of the naming rights of a professional sports venue in combination with certain activities can result in a valid service mark in the international class 041 for education and entertainment. The legal analysis is in large part influenced by private arrangements, the PTO's perception of a company's market context, and the public perception of the provision of entertainment services and arguably with respect to the ownership of those service marks. With regard to the entertainment service, more involvement of a corporate sponsor outside of its primary product is important. With respect to the ownership, the corporate sponsor should at least make sure that it addresses this issue and stipulates the clauses within the naming rights agreement in a way such that it will exercise enough control over the quality of the potential service mark.

Footnotes

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18 Id.

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20 Anzivino, supra note 12, at 57.

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48 15 U.S.C. § 1053 (2000).

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51 Id.

52 United States Patent and Trademark Office, Trademark Manual of Examining Procedure (3d ed. 2002), available at http:// www.uspto.gov/web/offices/tac/tmep/ [hereinafter Trademark Manual].

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57 Trademark Manual, supra note 52, at 1301.01(a)(iii).

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59 In re Television Digest, Inc., 169 U.S.P.Q. (BNA) 505 (T.T.A.B. 1971).

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63 Trademark Manual, supra note 52, at 1301.01(b)(i).

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